AKIN KHAN

v.

PUBLIC PROSECUTOR

SUPREME COURT, KOTA BHARU
WAN SULEIMAN SCJ
HASHIM YEOP SANI SCJ
SYED AGIL BARAKBAH SCJ
[CRIMINAL APPEAL NO. 39 OF 1985]
15 FEBRUARY 1987

CRIMINAL LAW AND PROCEDURE: *Appeal - Charge of trafficking in cannabis - Presumption of possession against accused - Degree of proof required to rebut presumption - Test to be applied similar to that in civil proceedings - Dangerous Drugs Act 1952 - Section 37 (d), (da).*

EVIDENCE: *Presumption raised by prosecution - Rebuttal of presumption - Whether rebutted by a defence as being reasonable and probable.*

The appellant was charged with trafficking in cannabis, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ("the Act").

A police constable, acting on information, stopped the appellant who was carrying a bag in which were articles of clothing, a prayer mat and leaves wrapped around little sticks. The leaves weighing 950 grammes were found to be cannabis.

Based on the testimonies of the prosecution witnesses whose evidence were not in dispute, the learned trial Judge held that the prosecution evidence had raised the presumption of possession under s. 37(d) & (da) (vi) of the Act. The learned trial Judge was of the opinion that the accused's defence had failed to rebut the presumption and could not be considered to be consistent with his innocence or be reasonably true on a balance of probabilities.

The appellant was found guilty and was accordingly sentenced to death by the High Court.

The sole ground of appeal raised by the appellant for the Supreme Court's determination was that the learned trial Judge had applied the wrong quantum of burden in coming to his finding that the appellant had failed to rebut the presumption raised by the prosecution evidence and in consequence the appellant is entitled to acquittal.

Held:

[1] Regarding the first limb to the words used by the learned trial Judge in implying the burden required of the accused i.e "it could not be considered to be inconsistent with his innocence", Their Lordships were of the view that although it is a term commonly used by the Courts to indicate the ordinary burden of proof upon an accused person when the defence is called, nevertheless such a lesser burden if applied can hardly be objectionable.

[2] Regarding the second limb i.e "it could not be considered to be reasonably true on a balance of probabilities", Their Lordships were of the opinion that it is the heavier burden which the law places upon the accused once the presumption comes into effect.

[3] Although the decision of the High Court was upheld, nonetheless, their Lordships were of the opinion that the learned Judge ought to have confined himself to the time-honoured description, of this burden as commended in the Privy Council decision of *Public Prosecutor v. Yuvaraj* i.e. the burden upon an accused person would be the same as that applied in civil proceedings i.e. "on the balance of probabilities".

[Appeal dismissed. Conviction and Sentence confirmed.]

Cases referred to:
Public Prosecutor v. Yuvaraj [1969] 2 MLJ 89
Rex v. Carr Briant [1943] KB 607

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39B(2), 37(d), (da)(vi)
Courts of Judicature Act 1964, s. 66

For the appellant (Assigned) - Teoh Poh Onn; M/s. HS. Lim, Teo & Partners
For the public prosecutor - Zain Abd. Rahman, DPP

JUDGMENT

Wan Suleiman SCJ:

The appellant was charged with trafficking in 951 grammes of cannabis, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952. He was found guilty and was accordingly sentenced to death.

The learned Counsel for the appellant's sole ground of appeal is that the learned trial Judge had applied the wrong quantum of burden in coming to his finding that the appellant had failed to rebut the presumption raised by the prosecution evidence, and in consequence the appellant was entitled to an acquittal.

The prosecution case was that PC Wahed bin Yusoff had on 21 August 1983 acting on information received stopped the appellant who was carrying a bag in which were articles of clothing and a prayer mat, and a quantity of green leaves, or to be exact, leaves wrapped around little sticks. He obtained the help of a passer-by Hassan bin Idris to hold the accused whilst he fetched his handcuffs and his motorcycle from his house nearby, taking with him the bag P7 which he left at his doorstep within sight whilst he was inside the house. He subsequently handcuffed the appellant and then took him to the Police Station where he handed the exhibits C to the OCS., PW4.

PW4 counted the 540 sticks which weighed 1250 grammes. These sticks were later handed to the Chemist who weighed the leaves minus the sticks and found the leaves to weigh 950 grammes, the quantity mentioned in the trial.

A cautioned statement was recorded from the appellant which the learned trial Judge held to be inadmissible because it was taken in standard Malay by the recording officer whilst the appellant's mother tongue was Pakistani though he also spoke Thai and Pattani Malay.

As the learned Judge correctly noted the case largely depended on the testimony of the Chemist (PW1), the PC (PW3) and the by-stander (PW8), all of whom had impressed him as honest and truthful witnesses whose evidence he had no reason to doubt. His Lordship dealt with apparent discrepancies and certain other relevant points brought out in cross-examination of prosecution witnesses with commendable thoroughness.

He then held that the prosecution evidence had raised the presumption under s. 37(d) and (da) (vi) of the Act.

Then he proceeded to consider the testimony of the appellant. Appellant said that he had gone to Jerteh, Trengganu from his hometown Narathiwat in Thailand on 1 July 1983 in an attempt to collect debts owing to his father from one Roni @ Ghani bin Yusoff. When Roni was unable to pay, appellant then asked if he could stay and work in Jerteh; but was told that there were no jobs available. He then returned to Thailand. On 5 August 1983 he met Roni at Yala in Thailand and was told that there was a job available at Jerteh, but appellant could not go because he had work to do in Yala.

On 21 August 1983 however he crossed over to Malaysia without any travel documents carrying his bag P7 in which admittedly there were the prayer mat and the articles of clothing later found but not the ganja. On the Malaysian side he was arrested by a person who identified himself as a police officer, and who after examining the contents of his bag told him he was being arrested for not having travel documents. He was then taken to a house and leaving him outside the arresting officer entered the house taking along the bag P7. Three men present outside the house urged him to run away but he refused to do so saying that he had committed no offence except for entering the country with no travel documents. The arresting officer subsequently emerged, handcuffed him and took him to the Pengkalan Kubor Police Station. He was not shown any cannabis there. He was then taken to Tumpat Police Station and it was there that he was shown his bag which now also contained some dried leaves whereupon he denied that the dried leaves were his. He claimed to be a cloth merchant, doing business in Thailand.

The police located Roni who together with his wife were called as prosecution witnesses. Though both said their hometown was Narathiwat they denied knowing the appellant. The learned Judge expressed his scepticism on the necessity for appellant to stay and work in Jerteh if he was already a cloth merchant in Narathiwat, since no explanation had been given for his desire to change both occupation and place of residence.

The Judge also noted the substantial difference between appellant's version of his arrest and that of the prosecution, particularly his insistence that the arresting officer had taken the bag into his house and the absence of Hassan bin Idris (PW8). The learned Judge remarked that this was probably to insinuate that PW3 had planted the cannabis into the bag during that period of time.

We should perhaps set out in full the remainder of the judgment:

> Having seen and heard the accused and considered his defence as a whole, I did not believe him. In view of PW3 and PW8's earlier testimony, I held that the accused's version was merely a concoction to suggest that it was PW3, when he went into the house alone with the bag leaving the accused outside, or subsequently somewhere in one of the police stations, who had put in the cannabis into the accused's bag so as to frame the accused up for this offence. In the absence of any grudge or misunderstanding, surely if PW3 was going to nail the accused on a capital charge such as this, he would not have left the accused unguarded outside his house while he took steps to plant the incriminating evidence. He had ample time at the Pengkalan Kubor Police Station to do so if, as the accused had alleged, the accused had not seen the bag until much later at the Tumpat Police Station. As regards this fact that the accused said he never saw the bag and its contents at Pengkalan Kubor Police Station but only later at Tumpat Police Station after the cannabis had been put in, PW4 had earlier stated, and I had accepted his evidence, that the bag and its contents were examined in the accused's presence at the Pengkalan Kubor Police Station and PW3 also counted at the same time. The

accused's allegations of assault at both the Pengkalan Kubor and Tumpat Police Stations were also not substantiated by any other evidence. Further the contents in P7 does not in any way support the accused's contention that he was going to stay and work in Jerteh for an indefinite period.

Having deliberated dutifully on the defence, I was of the considered opinion that the accused's version had failed to rebut the presumptions raised by the prosecution and was in effect a mere denial of the charge calculated only to pervert course of justice. It could not be considered to be consistent with his innocence or be reasonably true on a balance of probabilities.

The essence of this finding is that the learned trial Judge did not believe the appellant at all.

The *locus classicus* of cases on the shift of proof where a presumption comes into effect is that of *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89 which confirms earlier decisions that the burden upon an accused person would be the same as that applied in civil proceedings, i.e. the balance of probabilities. In *Yuvaraj's* case, the question reserved for the decision of the Federal Court under s. 66 of the Courts of Judicature Act 1964 and later on appeal considered by the Privy Council was:

Whether in a prosecution under s. 4(a) of the Prevention of Corruption Act, a presumption of corruption having been raised under s. 14 of the said Act the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable or whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists.(s. 3 of the Evidence Ordinance).

Their Lordships of the Privy Council held that there was no relevant difference between the two descriptions of the burden of proof of rebutting the presumption of corruption. In the instant appeal the words implying the burden upon the appellant were "it could not be considered to be consistent with his innocence or be reasonably true on a balance of probabilities". The first limb thereof i.e "to be consistent with his innocence" is a term commonly used by the Courts to indicate the ordinary burden of proof upon an accused person on the defence being called, it is the lesser burden also sometimes expressed as "a story which has thrown a reasonable doubt on the truth of the prosecution case" - see those cases referred to in *Mallal's Criminal Procedure Code* 4th Edn. 276 under the heading "Explanation consistent with innocence". Such lesser burden if applied can hardly be objectionable.

The next limb i.e. "it could not be considered to be reasonably true on a balance of probabilities" is the heavier burden which the law places upon the accused once the presumption comes into effect, as was held in *Rex v. Carr Briant* [1943] KB 607 referred with approval in *PP v. Yuvaraj* (*supra*).

If we may with respect suggest, the questions raised in the present appeal would not have arisen had the learned Judge confined himself to the time-honoured description of this burden as commended in *Yuvaraj's* case, i.e. "on the balance of probabilities".

We dismiss this appeal and would confirm both the conviction and the sentence.

Also found at [1987] 1 CLJ 348